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Published in:
Hong Kong Law Journal

Publication date:
2015

Document Version
Peer reviewed version

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):

Jones, B. C., & Su, Y. T. (2015). Confrontational Contestation and Democratic Compromise: The Sunflower Movement and Its Aftermath. *Hong Kong Law Journal*, 45(1), 193-210.

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CONFRONTATIONAL CONTESTATION AND DEMOCRATIC COMPROMISE: THE SUNFLOWER MOVEMENT AND ITS AFTERMATH

By Brian Christopher Jones* and Yen-Tu Su⁺

This piece begins by describing the two conflicting visions of democracy involved in the events surrounding the Taiwan Sunflower Movement, and examines the justifications for the Movement from the perspective of democratic theory. We characterize the Movement as an instance of “confrontational contestation”. This theory stems from the belief that the Sunflower Movement events represented a unique type of democratic disobedience, and new understandings regarding disobedience have emerged from these circumstances. The second part of our paper analyses the cases for and against prosecuting Sunflower Movement members. Ultimately, we argue that prosecution would only prolong and enhance political conflict, whereas non-prosecution may serve as a measure of democratic compromise and as such would be more conducive to the pursuit of democratic peace.

Clashes over visions of democratic governance can oftentimes be epic, and lasting. The Taiwan Sunflower Movement (the Movement) of March and April 2014 ensured these clashes would be epic; whether they will be lasting is yet to be seen. After KMT lawmakers pushed a Taiwan-China service trade pact through the legislative process within a matter of seconds, members of the Movement (the Sunflowers) broke through police barricades to occupy the Legislative Chamber, where they would reside for twenty-four days. In essence the Movement, which even came as a surprise to the opposition Democratic Progressive Party (DPP), decisively challenged the Ma Administration and the KMT’s version of a “winner-take-all” democracy, providing a competing vision based around deliberation, participation, and Taiwan’s sovereignty. It is not unusual to have competing visions of democracy within a given democratic polity. Indeed, democracy is in constant tension with itself, and it often means different things to different people. The Sunflower Movement and its aftermath nonetheless hold promise in becoming an intriguing story for democratic theory—a story about how, after a peaceful yet dramatic confrontation, which went one step further than usual protests, people holding very different democratic convictions can still live together in peace and resolve their differences through a democratic political process.

Our paper explores the significance and implications of the Sunflower Movement for democracy in Taiwan and pro-democracy protests elsewhere. Specifically, we are interested not only in whether and how the Movement can be justified in democratic terms, but also in which scenario this chapter of Taiwan’s democratic history will end in—either a protracted legal-political confrontation, or a regenerative democratic peace. We attempt two major inquiries in this piece:

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1) to account for the democratic significance of the Sunflower Movement with a theory of *confrontational contestation*, and 2) to make the case for non-prosecution of the Sunflowers as a *democratic compromise* for the sake of fostering democratic peace in Taiwan. While there are apparent inconsistencies or tensions in calling for both contestation and compromise, we hope to demonstrate how they can complement one another as the yin and yang that keep democracy alive and well in Taiwan and elsewhere.

The Sunflower Movement as Confrontational Contestation

One central issue of the normative discourse surrounding the Sunflower Movement has to do with its democratic credentials: All things considered, is the Movement a democratic, non-democratic, or anti-democratic action? The answer to this question is the key to understanding the causes and consequences of the Sunflower Movement, though the answer appears to depend on whom you ask. For some, especially for the (KMT) Ma Administration and their sympathizers, the Sunflowers illegally hijacked the legislative process and thereby put Taiwan's democracy in jeopardy. For others, including many Sunflowers, the Movement constitutes a democratic self-revision without which tomorrow's Taiwan could resemble today's Hong Kong. A disinterested observer might want to take a middle-of-the-road position by suggesting that the occupation is a non-democratic measure, and only history can tell whether the Movement is positive or negative for Taiwan's democracy. There is much to be said about the virtues of striving for being fair-minded and taking a long-term perspective. But democracy is a history in and of itself,¹ and the very project of democracy compels that we the contemporaries make our own judgment call—right here, right now.

How we conceptualize the Sunflowers' occupation—including the 24-day occupation of the Legislative Chamber (along with the peripheral streets), and the short-lived occupation of the neighbouring Executive Yuan—also affects our thinking about the place of the Movement vis-à-vis democracy in Taiwan and beyond. Viewing the occupation as an exercise of civil disobedience, for instance, might prompt us to argue for or against the Movement as a liberal cause, by which the minorities (as represented by the Sunflowers) seek to counteract what the majority (as represented by the government) has done wrong. However, we think the Sunflowers' occupation comes closer to exemplify what Daniel Markovits terms as democratic disobedience, the goal of which is to ensure that a well-functioning democratic process corrects the perceived democratic deficits in the law and politics of the day.² The normative justification for the Movement is better cast in democratic terms, because doing so better captures the mind-set of many Sunflowers—that they were “defending democracy”. In addition, in light of the dismal approval ratings of the Ma Administration and the KMT-led legislature, it is far from indisputable that they still get to stand for the political majority in Taiwan. The Sunflower Movement often spoke in the name of “we the

¹ See Pierre Rosanvallon, “Foreword”, in Samuel Moyn (ed), *Democracy Past and Future* (New York: Columbia University Press, 2006).

² Daniel Markovits, “Democratic Disobedience” (2005) 114 *Yale Law Journal* 1897.

people” and enjoyed fairly strong public support during their occupation.³ It appeared to be more of a majoritarian uprising than a counter-majoritarian resistance.

Democratic citizen unrest has been given a number of labels throughout the years: “protest”, “civil disobedience”, “dissent”, “people power”,⁴ and the relatively newly-minted “direct action”.⁵ Nevertheless, given how the Sunflower events transpired, and especially given the equally dramatic ending of the legislative occupation, labelling the events merely a form of disobedience would be inadequate. In an attempt to alleviate these problems and to designate the unique nature of the events, herein we use the phrase “confrontational contestation”. The “contestation” portion was borrowed from Philip Pettit,⁶ and refers to a citizenry actively contesting the nature of their democracy through political engagement.⁷ The “confrontational” part of our phrase is also important, and primarily refers to the fact that many contemporary contestatory actions are not necessarily confrontational. Yet the twenty-first century has seen a new wave of protests that are examples of actively confrontational disobedience (i.e., occupying public places, such as streets, parks and buildings).⁸

Pettit discusses aspects of civil disobedience when confronting the ideas and issues about the legitimacy of a political order. Ultimately he concludes that if the current regime is legitimate, then “attempts to change unjust laws should be restricted to measures that are consistent with the regime’s remaining in place”.⁹ This would seem to encapsulate the Sunflower Movement, which indeed decided to act within the confines of the current regime. However, Pettit also maintains that civil disobedience campaigns should not involve “taking the law into your own hands”, and that recognition of “the state as the appropriate arbiter of legal issues” is essential to challenging the laws.¹⁰ The Movement’s actions may have run contrary to this proposition to some extent. After all, by occupying the legislature for twenty-four days, the Sunflowers arguably took the law into their own hands—at least for the time being. And while the Sunflowers certainly engaged in disobedience, they may have gone one step further than what Pettit would recommend for dissenters within a legitimate political order. Nevertheless, we argue that democratic contestation cannot rule out a priori the use of confrontational yet peaceful disobedience.

³ Chris Wang, “Majority supports referendum on trade agreement: survey”, *Taipei Times* (29 March 2014), p. 1; *see also*, Opinion Poll by TVBS (20-21 March 2014) Do you support the Sunflower’s occupation of the Legislative Chamber (Yes: 48%, No: 40%, Undecided: 10%); Opinion Poll by TVBS (24 March 2014) Do you support the continued occupation of the Legislative Chamber (Yes: 51%, No: 38%, Undecided: 11%); Opinion Poll by TVBS (7-8 April 2014) Whether you think this Movement is helpful or not for Taiwan’s democracy (Helpful: 65%, Unhelpful: 26%, Undecided: 9%).

⁴ April Carter, *People Power and Political Change* (London: Routledge, 2012), pp. 7-12.

⁵ April Carter, *Direct Action and Democracy Today* (Cambridge: Polity Press, 2005).

⁶ Philip Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (Cambridge: CUP, 2012).

⁷ Of course, we are not the only theorists to be affected by Pettit’s ideas. For an interesting and more thorough take on disobedience and democracy, *see, e.g.*, William Smith, *Civil Disobedience and Deliberative Democracy* (London: Routledge, 2013), pp. 128-133.

⁸ Although, not all these incidents amount to a “confrontational contestation”.

⁹ Pettit, *On the People’s Terms* (2012), p. 137.

¹⁰ Pettit, *On the People’s Terms* (2012), p. 137.

The idea of confrontational contestation can also be understood as a revision of the ideas of civil and democratic disobedience. Deficiencies in the liberal view of civil disobedience¹¹ have been around for years, and recent commentators have become more wary of such a view. Raffaele Laudani notes that from “Rawls’s perspective, the whole element of *challenging* the political order is completely absent”, and that civil disobedience ultimately becomes a “sui generis ‘appeal’ to the majority so that they ‘reconsider’, in the name of a common sense of justice, their decisions made”.¹² Laudani further criticises this perspective as “unable to find a real space of intervention”, noting that liberal justification for acts of civil disobedience are possible “only ex post, after its compatibility with the current system has been verified”.¹³ Tony Milligan also notes that Rawls’s account of civil disobedience does not take into consideration issues outwith basic human liberties, such as economic, environmental or animal rights protests, which make “it ill-suited as a tool for analysing and understanding key instances of twenty-first-century protest and dissent”.¹⁴

Conversely, republican democratic disobedience revolves around the processes of democracy rather than any perceived democratic ideals. Markovits claims that democratic disobedience arose because an important form of political engagement has emerged that “cannot be understood through the prevailing theoretical accounts of legal and political authority”.¹⁵ In particular he notes that “[i]t aims to render plausible the counterintuitive claim that disobeying the laws of the democratic state *can serve democracy*. Indeed, the argument casts democratic disobedience as an unavoidable, integral part of a well-functioning democratic process”.¹⁶ One of the keys to the republican, democracy-enhancing vision, is seen in what Markovits labels a “democratic deficit”.¹⁷ This occurs when democratic governments open themselves up to deficits of democratic legitimacy. This description of republican disobedience likely categorises the Sunflower Movement as an example of republican democratic disobedience. Indeed, “the republican view opens up the possibility that political disobedience may be democratically justified even when it cannot be cast as protecting basic rights”.¹⁸ The Sunflower Movement events are difficult to explain through any basic rights lens; it mostly concerned a lack of governmental/parliamentary accountability, and an obvious breach of parliamentary procedures.

The Sunflowers did not merely disobey, however: they also provided a duelling vision of democracy, which is elaborated on below. The unveiling of this vision moved their actions beyond democratic disobedience, and into a “contestation”. Pettit states that democratic life must have an “antagonistic” character.¹⁹ Indeed, he argues that a contestatory citizenry

“must be on the watch for proposals or measures that are not suitably supported ... and they must be ready to organize in opposition to such policies. It is only in the presence of

¹¹ For prominent examples of the liberal view, see John Rawls, *A Theory of Justice* (Cambridge: HUP, 1999); Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: HUP 2000); Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: YUP, 1980).

¹² Raffaele Laudani, *Disobedience in Western Political Thought: A Genealogy* (Cambridge: CUP 2013), pp. 113-114. Emphasis in original.

¹³ Laudani, *Disobedience in Western Political Thought*, pp. 115-116.

¹⁴ Tony Milligan, *Civil Disobedience: Protest, Justification, and the Law* (London: Bloomsbury, 2013), p. 14.

¹⁵ Markovits, “Democratic Disobedience”, p. 1902.

¹⁶ Markovits, “Democratic Disobedience”, p. 1902. Emphasis is ours.

¹⁷ Markovits, “Democratic Disobedience”, pp. 1921-1928.

¹⁸ Markovits, “Democratic Disobedience”, p. 1911.

¹⁹ Pettit, *On the People’s Terms* (2012), p. 226.

concerted, sustained oversight of government activity – only in the presence of civic vigilance, in the old term – that we can have any assurance that government will be forced to remain responsive to popular inputs”.²⁰

Not everyone in Pettit’s democratic ideal must engage in such contestatory activities, which is why watchdog groups and other activists are integral to democracy. As those students and civic groups that formed the Movement were vigilant in the face of government policy which they thought was not suitably supported by the public, the Movement certainly fits in Pettit’s account for democratic contestation. Ultimately, Pettit’s vision “reject[s] the romantic idea of each citizen’s exercising a panoramic, altruistic form of oversight; it also rejects the equally romantic idea of a participatory, Rousseauvian engagement,”²¹ which, according to Pettit, betrayed traditional notions of Republicanism by not acknowledging the contestatory roles of each and every citizen.

In any event, the Sunflowers had taken over the Legislative Chamber for more than three weeks in the spring of 2014.²² A few critics of the Movement—including, among others, President Ma Ying-jeou—seemed to suggest that, by illegally occupying the Chamber and paralyzing the legislative process for such long a time, the Movement was by nature anti-democratic. We disagree. As unusual and confrontational as it may be, the Sunflowers’ occupation was clearly within the bounds of non-violent disobedience. And if non-violent disobedience is a morally justifiable way of democratic life, there is simply no reason why the legislature (or any other formal institutions of democracy, for that matter) should be insulated from the disruption of otherwise morally justifiable disobedience. The outright rejection of the Sunflower Movement as anti-democratic “mob rule” for no reason other than its disruption of the legislative process makes sense only if we think there is so little room for democracy-compatible disobedience that democracy is little more than what is institutionally practiced and legally allowed. The Sunflowers’ occupation alone, therefore, did a service to Taiwan by challenging such a deeply reactionary view and thereby enlarging the space as well as our imagination of democratic political engagement beyond the confines of positive law.

Democratic Justifications for the Sunflowers’ Occupation

It remains to be determined whether or not the Sunflowers are justified—from a democratic perspective—to occupy the Legislative Chamber and thereby derail the Ma Administration’s attempt to finalize the service trade agreement between Taiwan and China. As a matter of democratic political morality, the Sunflowers have to convince not only their own conscience, but also their fellow citizens that what they did was morally acceptable (or even morally right) from

²⁰ Pettit, *On the People’s Terms* (2012), p. 226.

²¹ Pettit, *On the People’s Terms* (2012), p. 227.

²² It is worth noting that Opposition DPP legislators, while surprised by the initial legislative takeover, also played a small but significant role in the events by acting as “security guards” for the Sunflowers. They sat between the police and the protestors, providing the Movement with a buffer zone and a type of protective legitimacy within the Legislative Yuan they probably would not have otherwise received. Indeed, while no DPP representatives participated in the Sunflower Movement leadership, DPP legislators facilitated the entry and exit of Movement participants in terms of gaining access to the Legislative Yuan.

the perspective of democratic justice. And since the Movement effectively altered the course of the representative democratic process with such forceful intervention, but without express authorization of the people, the democratic legitimacy of the Movement is dependent, by and large, on whether the democratic justice they sought to achieve, or the democratic injustice they sought to redress, could justify the drastic actions/means they took.

The Sunflowers have put forward a myriad of justifications as to why their (extra-electoral) confrontational contestation with the democratic authorities of the Ma Administration and the KMT-led Legislative Yuan should be considered justified from the viewpoints of democratic justice. Here we identify four justifications and analyse them one by one, for, while interrelated to one another, they invoke different principles/ideals of democratic justice, diagnose different pathologies of the institutionalized democratic politics in Taiwan, and encounter different challenges from both within and outside the Movement. These differences serve as a powerful reminder that there exists more than one type of “Sunflower”—i.e., the Movement is in fact a political coalition as opposed to a homogeneous or single-issue unity. The democratic case for the Movement, however, is much stronger when these justifications work together rather than separately. Here, the whole is arguably larger than the sum of its parts.

(i) *Defending democracy against China*: Many Sunflowers and their supporters oppose the disputed service trade pact because they deem it a Trojan horse sent by China to suffocate Taiwan’s sovereignty and democracy with the force of economy. Specifically, many critics of the agreement have grave misgivings about the threats to free speech and national security posed by the pact’s arrangements concerning such industries as printing and telecommunications. The Movement, accordingly, can be understood as a *pre-emptive resistance* to a measure that is alleged to have democracy-degrading effect of transforming Taiwan into another Hong Kong. In sharp contrast, the Ma Administration and their supporters defend the service trade pact as a deal offering more benefits than harms to Taiwan, and denounce their opponents as being Sinophobic. The trade policy disagreement aside, much of the ensuing contestation can be explained in terms of identity politics: Whereas the patriotic Sunflowers seek to defend democracy—as an integral part of Taiwan’s national identity—against China’s co-optation, their critics take pride in being more cosmopolitan, and/or being Chinese nationalists instead.

The principal location of the protest was no accident: Sunflowers aimed at the legislature primarily because it is the most democratic manifestation of “we the people” sovereignty.²³ The sayings “parliament belongs to the people” and “return the parliament to the people” were commonly chanted throughout the occupation. It seems undisputed that a focus back on democracy, and especially the power of citizens, was an instrumental element of the movement. Although there may have been similar origins,²⁴ the Sunflower Movement was quite different from many of the other occupy movements, which manifested in parks, streets, and other public areas. Going to the legislature was a bold, and important, part of the disobedience. Initially, it was easily the Sunflowers’ largest bargaining chip. Movements in other places have not had the same access to their legislatures that the Sunflower Movement enjoyed.²⁵ Therefore the choice of venue, the

²³ Although, as Post notes, “[d]emocracy is distinct from popular sovereignty”. (Robert Post, “Democracy and Equality” (2005) *The Annals of the American Academy* 24, 25).

²⁴ i.e., public space belongs to the people.

²⁵ Many citizens simply do not have access to their legislatures, either because of the copious amounts of security surrounding the building, or because of the structural layout of the building. As John Parkinson points out, “while

Legislative Yuan, was a strategic democratic contestation. In the KMT rush to pass the service trade pact, some saw the authoritarian government of Beijing behind such a move, and not the makings of a democratized Taiwan. A protest focused in and around the legislature, the ultimate democratic symbol of “we the people” popular sovereignty, was a significant reminder that Taiwan, unlike the PRC, and ultimately, distinct from Hong Kong, is a democracy.

(ii) *Democracy as social economic justice in the age of FTAs*: During the Movement’s occupation, there was an extensive debate among the Sunflowers about what should be the focus of their campaign—the social economic injustice perpetrated or aggravated by the neo-liberalist free trade regime (including not just trade agreements between Taiwan and China, but the overall dearth of socio-economic injustice in twenty-first century international trade), or the procedural injustice of black box decision making in the disputed service trade agreement. Although the leadership of the Movement signed onto the latter in the hope of winning more public support, many Sunflowers hold the belief that a truly meaningful democratic process ultimately would lead to the realization of a social economic order that is much more just than it is now. Seen in this light, the Movement has certain genealogical affinities with such protests as Occupy Wall Street, and thereby can be said to be built, at least in part, on the idealism of social democracy.

(iii) *Defending democracy against the imperial executive*: On March 17, 2014, a KMT Legislator—acting on his prerogative as a Committee Chair and with the backing of the Ma Administration and the KMT Caucus—used a hidden microphone to proclaim, in just 30 seconds and without a vote, that the remaining committee sessions for the legislative review of the service trade agreement had lapsed. The infamous move that triggered the Sunflower Movement was defended on the ground that the service trade agreement falls entirely within the purview of the executive branch, and thereby should take into effect the moment when the legislative oversight lapsed. The Sunflowers not only condemned the ludicrous oversight-stopping move as the last straw that broke Taiwan’s democracy. Viewing the near absence of checks and balances as the root cause of black box agreement making, they also demanded that such critical agreements between China and Taiwan as the service trade pact at issue be placed under legislative oversight that is much more meaningful and scrupulous than is now. By demanding “legislation (of the oversight act) before review (of the service trade pact)” and later proposing a draft bill on the legislative oversight of cross-Straits agreements, the Sunflowers sought to redress the alleged democratic deficits accumulated through the power imbalance between the executive and the legislative branches in the existing regime of the cross-Straits law in Taiwan. Nevertheless, the Ma Administration admits few mistakes in their handling of cross-Straits relations and rejects the Sunflowers’ draft bill as a legislative encroachment on the executive prerogative.

Attempting to fill a democratic deficit, which was based around an overtly manipulative procedural (mis)calculation, could have been the main action the Sunflowers engaged in. The Movement saw such a procedural manoeuvre as not only dishonest, but also as a genuinely significant threat to Taiwan’s democracy (in terms of how future bills, economic agreements and other governmental business may be handled). This is coupled with the reality that at the time of the Movement, the Ma Administration and the KMT majority had comparatively low

the managers of legislatures might celebrate publicness in the abstract, they tend to react to real publics with a great more ambivalence” (John Parkinson, “How legislatures work – and should work – as public space” (2013) 20(3) *Democratization* 438, 439).

legitimacy/favourability levels. Citizens were largely unhappy with the way Taiwan was being governed, both from an executive and a legislative point of view. This was not just a fraction or segment of discontent; rather, it was widespread. Governments in this situation are vulnerable, even to potentially undemocratic means and ends. Fortunately for the Ma Administration, the citizens that contested their authority rooted themselves in democratic principles. In such “democratic deficit” situations, “[a] citizen may reasonably conclude, in such cases, that the policies in question do not reflect the will of any sovereign to which she belongs, in which case her individual sense of authorship of the collective decision will run out”.²⁶ Indeed, this lack of authorship, in addition to the underhanded nature by which the agreement was handled, played an instrumental role in the Movement. Participants considered themselves to have no other options but to forcefully intervene in the democratic process.

(iv) *Defending democracy against “winner-take-all” politics*: The 30-second oversight-stopping showdown may have proven to be a strategic blunder on the part of the Ma Administration, but it also epitomizes the winner-take-all politics that has so far contaminated the democratic governance in Taiwan: Regardless of what legitimate concerns the opposition, the affected interests, and/or the civil society may have over a given policy, those who rule—by winning elections—would implement their policy resolutely, uncompromisingly, and by whatever means they can get away with. This would arguably be the script for the controversy over the service trade agreement if not for the Sunflowers’ intervention. After signing the agreement with China in June 2013, the Ma Administration first sought a quick up-or-down vote on the whole pact in the Legislative Yuan. Even though the KMT Caucus later on had to make concessions on the holding of public hearings and item-by-item review under public pressure, there was little doubt that the hearings would have no effect on the final outcome, and it would only be a matter of time before the Legislative Yuan passed the agreement in a party-line vote. The Sunflowers refused to recognize the democratic legitimacy of such winner-take-all governance, for it limits public participation to elections and leaves little room for compromise and deliberation. That the non-deliberative occupation of the Legislative Chamber was soon followed by such deliberative praxis as “deliberation on the street” further strengthens the democratic case for the Movement from a deliberative democratic perspective.²⁷ Conversely President Ma and the KMT saw the obstruction of their electoral mandate, by both the opposition and the Sunflowers, as the biggest crisis for Taiwan’s democracy.²⁸

What happened, then, was an epic confrontation of two competing visions of Taiwan’s democracy: one from the Ma Administration and their legislative majority, and the other from the Movement. The former is characterised as being more cosmopolitan/pro-China, more receptive to the concentration of powers in the executive’s hands, and viewing winner-take-all as the rightful implementation of the electoral mandate. The latter, by sharp contrast, is more patriotic, more critical of China and the neo-liberalist economic order, and embraces increased checks and balances, public deliberation and more consensual politics as to what separates democracy from electoral authoritarianism. While it remains a matter of debate under what circumstances such a confrontational contestation as exemplified by the Movement is justified in terms of democratic

²⁶ Markovits, “Democratic Disobedience”, p. 1927.

²⁷ See, e.g., Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton: PUP, 2004), p. 51.

²⁸ Chris Wang, “Crossing the Strait: Ma Slams Service Pact Critics, DPP in Interview”, *Taipei Times* (27 June 2014), Page 3.

political morality,²⁹ it seems that the wider the differences between the competing visions of democracy, the more forceful and confrontational the democratic contestation may be.

Mid-game versus end-game

While the Sunflower Movement fiercely contested the democratic legitimacy of the Ma Administration, it is important to remember that, in the end, they chose to return to life under the existing order of democracy in Taiwan. The Sunflowers sought democratic enhancement, not revolution.³⁰ As critical of the Ma Administration and the current state of Taiwanese democracy as they were, the Sunflowers were keen to win over general public support by exercising self-restraint and moderation, and by establishing themselves as vocal, but reasonable and pragmatic, dissidents. This ultimately led to their peaceful withdrawal from the Legislative Yuan, and also the symbolic return of the gavel to its rightful place within the Chamber. Similarly, even though the Ma Administration vehemently disagreed with the Sunflower Movement, they too were constrained to operating within the bounds of democracy. Opinion polls showed the Movement contained strong support among the Taiwan populace.³¹ Therefore Administration officials had to remain sensitive to the limits of their own actions in regard to the Movement, and thus pay homage to the dissenting voices within their democracy. Under these circumstances, the Sunflower Movement has played itself out as a mid-game as opposed to an endgame. However fierce the confrontational contestation of the Movement has been, democracy remains the only game in town and is arguably the most crucial enabling, as well as limiting, rule for confrontational yet peaceful democratic contestation.

In sharp contrast, the Umbrella Movement in Hong Kong faces more significant obstacles, the most obvious being they are officially under jurisdiction of the PRC, and therefore have no functioning democracy to return to. It is therefore understandable that many pro-democracy activists in Hong Kong consider the Occupy Central/Umbrella Movement the endgame for their cause—democratizing the nomination for the long-overdue popular election of the Chief Executive. Given the lack of democratic mid-game options in Hong Kong, the confrontation between Umbrella protesters and the Hong Kong government (in conjunction with the PRC) has been much more intense and more persistent than what occurred in Taiwan. Unfortunately, winning an endgame for democracy is far more difficult than winning a mid-game within democracy.

²⁹ We did take into consideration whether there should be some kind of ex ante limiting principle for confrontational contestation, which goes one step further than contestation by means of typical disobedience. We would draw a bright line between confrontational contestation and armed conflicts (rebellion, insurrection, revolution, civil war...), and would therefore consider confrontational contestation as something like “disobedience plus,” the moral justifiability of which, like any form of civil/democratic disobedience, can only be determined on a case-by-case basis. With regard to the Sunflower Movement, and confrontational contestation in general, we believe that the most appropriate justification takes into consideration the totality of the circumstances in regard to the action taken. We leave open the question concerning the allocation of the burden of proof, and certainly welcome all comments and inquiries on the matter.

³⁰ Although some Sunflowers might have revolutionary aspirations, it is evident that the most radical and controversial move ever taken by the Sunflowers—i.e., the occupation of the Executive Yuan—stayed within the bounds of non-violent disobedience.

³¹ See n. 3 above.

Democratic Compromise (or Democratic Peace)³²

“The fundamental problem of human political life is how to address the tension between cooperation and competition: compromise is an essential element in relieving this tension”.³³

By striking the agreement with Legislative Speaker Wang, Jyn-Ping to end the occupation of the legislature, the Sunflower Movement ultimately decided to operate within Taiwan’s existing democratic order, however imperfect it may be. Although such a short-term agreement with the Speaker was indeed significant, we regard that as distinctly different from a potential democratic compromise not to indict the Sunflower Movement leaders and activists. Nevertheless Taipei’s district prosecutor indicted 119 Sunflowers on 10 February 2015.³⁴ Written before this expansive indictment of the Sunflowers, this section may turn out to be a counter-history to the events unfolding in Taiwan. While democratic peace may be achieved through many avenues, we hold that non-prosecution was the best way forward in this particular situation. Though the time for this option may have past, we think the normative case we make here still holds, and can serve as a distinct reminder of what the prosecutor has squandered through the far-reaching indictment.

Unlike an explicit democratic compromise as exemplified by the prosecutorial decision not to press charges against the Sunflowers, what Taiwan had experienced in the aftermath of the Sunflower occupation, until the February 2015 indictment, can be viewed as a *de facto* political ceasefire, in which both sides refrained from making major moves that could have reignited conflict. Against this backdrop, this section explores the idea and possibility of democratic compromise, and proposes that Taiwan break the cycle of traditional disobedience theory by *not prosecuting* the Sunflower leaders, let alone their fellow participants. We argue that non-prosecution could manoeuvre the temporary ceasefire into a democratic compromise, and as such, present the most promising way to achieve the ultimate democratic peace.³⁵

Civil disobedience, more often than not, gets punished; this is especially true for prominent examples of civil disobedience, as governments often look to reinforce their authority and rule of law principles in the face of such behaviour. With the hopes of conquering the moral high ground, those participating in the disobedience often accept punishments as marks of credibility and moral integrity. This standard mechanism also swung into motion regarding the Movement: while Sunflowers exited the legislature peacefully and without any state action being administered, several Movement leaders voluntarily turned themselves into authorities shortly after the occupation ended. The leaders were then questioned by prosecutors and released. In a sense, however, the traditional punishment/moral authority cycle had been broken for some time: sensing that any type of prosecution could further alienate the populace, including the opposition party,

³² We wavered between whether to call this a “compromise” or some type of political “reconciliation”. In the end we chose compromise, because we thought that the former is less demanding and therefore more realistic than the latter.

³³ Avishai Margalit, *On Compromise: And Rotten Compromises* (Princeton: PUP, 2010), p. 38.

³⁴ Jason Pan, “Prosecutors file charges against 119 Sunflowers” *Taipei Times* (11 February 2015), p. 1.

³⁵ Margalit, *On Compromise* (2010).

students, and other civic groups, the government appeared to have resisted prosecuting any Sunflowers, thus resulting in a de facto political “ceasefire” for some time in the aftermath of the Movement. We argue that the Administration should go one step further, implementing a democratic compromise that would fully drop the potential of any charges against the Sunflowers. Doing so would have allowed for a more complete healing of both sides, and permitted the democratic process (as opposed to the administrative or judicial branches, the traditional authorities in matters of disobedience) to adjudicate the democratic contestation initiated by the Movement.

Of course, strong cases can be made for and against prosecution of Movement participants. The government may argue, and indeed has publicly advanced the idea, that the Movement was anti-democratic, and deserves to be punished for so thoroughly injecting themselves into the democratic process. As we saw above, however, the Sunflowers were widely supported among the citizenry, and have even been categorised as a majoritarian uprising in some respects.³⁶ Beyond this, however, the Administration may be concerned that by accepting such a deal, governmental legitimacy could be undermined, as would long-standing “law and order” principles. From a governmental perspective, the Sunflowers clearly broke the law, and should be punished (i.e., they deserve “justice” for their actions). After all, democratic governments are highly dependent on (perceived) legitimacy, and prosecuting those who violate the law is a hallmark of government authority, and ultimately, legitimacy. If governments are unable to enforce their laws, then in some sense they have ceased to govern. However in the Sunflower Movement context this argument remains unconvincing, because there are indeed other ways that governments can attain legitimacy. Not prosecuting in particular situations can demonstrate to citizens that the government is responding in a legitimate, democratic manner to significant concerns raised by the populace. After all, “[c]onclusions about compromise—even more so than many other concepts in political theory and practice—depend heavily on context”.³⁷

Conversely, the Sunflowers believe they were far from anti-democratic: in the wake of a highly questionable (if not unconstitutional) legislative manoeuvre, the Movement claims to have filled a democratic deficit by stopping an unruly and unpopular elected government. They halted a far-reaching, non-transparent economic agreement from being imposed on their citizenry, and received relatively strong support while doing so. Additionally, while they occupied the legislature, the Movement ultimately left the consequences of their actions to be judged within the current political system. Although the Sunflowers seek a radical change of course of Taiwan’s cross-strait policy, they press for such change through democratic processes (including but not limited to the electoral and representative processes). A strong statement on this change, and on the Sunflower actions in general, was potentially made with the recent local elections, where the KMT got overwhelmed at the polls.³⁸ In this sense the coalition-based Movement has become more of a competitive rival than an anti-democratic opposition; an important distinction in regard to the making of a democratic compromise.

³⁶ See n. 3 above.

³⁷ Amy Gutmann and Dennis Thompson, *The Spirit of Compromise: Why Governing Demands It and Campaigning Undermines It* (Princeton: PUP, 2012), p. 12.

³⁸ Iok-sin Loa and Hsiu-Chuan Shih, “KMT Trounced”, *Taipei Times* (30 November 2014), available at: { HYPERLINK "<http://www.taipeitimes.com/News/front/archives/2014/11/30/2003605650>" }.

Avishai Margalit writes about sanguine compromise and the importance of recognising the other party's point of view. He stresses acting "for the sake of peace", which is distinct from acting "for the sake of justice", and notes that the Talmud (a Judaic text) contains three types of compromises:

- *Compromise to neutralise hostility*
- *Compromise to enhance harmony by reducing friction*
- *Compromise to indicate to your rival that you recognise the force and the legitimacy of his claim, even if you could win in a trial*³⁹

This third element is distinctly important in the Sunflower Movement context, and addresses the strong tension between cooperation and competition, noted above. Many Sunflowers could probably be prosecuted and convicted for their actions, and this perspective remains the most obvious and traditional line of thinking under such circumstances. Conversely, the government could recognise the force and legitimacy of the Movement's claim, distinguishing them not as an anti-democratic opposition, but as a competitive and legitimate rival that brought about convincing claims. Making such a distinction would likely move the Sunflowers outside the realm of any judicial retaliation, which would also benefit Taiwan's democracy. Although some may argue to go ahead and prosecute at least the Sunflower leaders and then pardon them upon conviction,⁴⁰ this scenario also presents significant problems. For one, there is an implicit revenge element, in that leaders would still be prosecuted and would have to endure the litigation. Additionally, and equally important, it would unnecessarily jeopardize the legitimacy of the judiciary, a branch of government the Taiwanese citizenry already regards as very distrustful. Indeed the very nature of such a decision would be advocating democratic conflict, albeit within "the bounds of the law", as opposed to promoting democratic peace.

A decision by the government *not* to prosecute would have been a grand democratic compromise that is best for Taiwan, and more importantly, is the optimal result for a stable and healthy democracy. Standing up for "law and order" principles and governmental legitimacy is perfectly acceptable in certain contexts, but holding an uncompromising position in the face of future democratic unrest only serves to fuel democratic conflict. The latter position is unreasonable, especially for a government that just got badly beaten at the polls based in part on their position regarding the halted service trade agreement. A decision on whether to press charges should not be delayed or dragged out any longer than it must be, considering "[a] process of compromise that involves undue pressure may encourage further polarization over time, weaken a democracy's capacity for cooperation, and make future compromises more difficult".⁴¹ For the sake of democratic peace, the continuing investigation into Sunflower Movement leaders had been "undue", and should have been dissolved.⁴²

³⁹ Margalit, *On Compromise* (2010), p. 41.

⁴⁰ The Ma Administration may argue, for instance, that "their hands are tied" in regard to the law, and that prosecution of Movement leaders must go forward.

⁴¹ Gutmann and Thompson, *The Spirit of Compromise* (2012), p. 46.

⁴² Even after the 10 February indictment, the law still provides an out for the prosecution in terms of making a democratic compromise. According to Article 269 of Taiwan's Criminal Procedure Act, the prosecutor may withdraw prosecution before the conclusion of the argument at the trial of the first instance, upon the prosecutorial

Although operating under different circumstances, the same goes for the Umbrella Movement leaders in Hong Kong. A democratic compromise (if it can be called so) in that situation would also be in the best interests of peace, as opposed to conflict, and the Government should think hard about prosecuting any members of the Movement. After all, Hong Kong citizens enjoy more freedoms than Mainland Chinese citizens in regard to expression, demonstration, and assembly.⁴³ No compromise in regard to prosecutions would virtually guarantee further mass protests, disruption of the city's public transit areas, and deeper distrust of the current PRC and Hong Kong governments. Surely the Hong Kong Government knows this. While such a compromise would not necessarily quell a Movement that appears determined to one-day vote in genuine democratic elections, it would potentially demonstrate that "rule-of-law" in Hong Kong, or at the very least some form of political compromise, is more than merely disingenuous rhetoric.

Lessons from history should also not be ignored. Indeed, past events regarding clashes over differing governmental visions can sometimes help put things in perspective, especially in regard to the consequences of political compromise or the lack thereof. In 1641 the tension between royalists and parliamentarians in England was palpable. Royalists believed the king ruled "by virtue of the divine right of kings", while parliamentarians believed that sovereign powers were community based, and were "then represented by the King, Lords, and Commons working together".⁴⁴ King Charles' ousting of the "Short Parliament", which would not sanction the raising of funds to counter a Scottish rebellion, eventually led to the "Long Parliament" being summoned. One of the leaders of that Parliament, John Pym, drafted a "Grand Remonstrance" which boldly outlined over two hundred grievances against King Charles and his trusted advisers. From a historical perspective it is now widely praised as a significantly influential civic protest, and is commonly presented as a clash between the "will of the people" versus the hegemony of a monarchy. The Remonstrance passed the House of Commons by eleven votes on 22 November 1641. Yet Charles did not respond to the petition until 23 December 1641. His response denounced the Remonstrance, but in a more measured and moderate tone than was his usual style. That moderate position did not last, however, and shortly thereafter Charles tried and disastrously failed to arrest and prosecute five members of Parliament, including Pym. The failed attempt is recognized as one of the key events which led to the decade-long civil war that broke out shortly thereafter.⁴⁵

Of course the stakes of the Remonstrance compared to the Sunflower Movement actions, actual civil war versus political civil war, are distinctly different. While the Remonstrance is known as one of the most remarkable and significant protests against a monarch, the Sunflower Movement of March/April 2014 (and especially the occupation of the Legislative Yuan) could be categorised as one of the most audacious protests in a contemporary democracy. But while the Sunflower Movement story is still being written, the circumstances surrounding the Grand Remonstrance can

finding that the indictment should not have been brought, or it is appropriate not to prosecute. Though the calculus of whether to drop the prosecution involves further complications, we think our argument for democratic compromise can still factor in the consideration of whether non-prosecution is appropriate.

⁴³ Pui-Yin Lo, *The Judicial Construction of Hong Kong's Basic Law* (2014), pp. 79-81, 85, 119-21. Although, such freedoms in Hong Kong are not absolute. The freedom of assembly, for instance, is subject to notification of the Police Commissioner, who has the power to deny the request (Yin, p. 120-21).

⁴⁴ Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Oxford: Hart 2006), p. 7.

⁴⁵ Ann Lyon, *Constitutional History of the United Kingdom* (London: Cavendish Publishing, 2003), pp. 217-218.

potentially be looked to for lessons from its ending. While democratic compromises remain inherently difficult, and in particular circumstances may call into question the legitimacy of a sovereign authority, they are necessary elements to peace, and even more so, to democracy. An unwillingness to engage in such agreements and governments, democratic or not, may eventually crumble.

Conclusion

What the Sunflower Movement has initiated, we argue, is an intensified and ongoing contestation for the very heart and soul of Taiwan's democracy. The *confrontational contestation* as signified by the Sunflowers' occupation is merely the beginning of this national soul-searching process, the outcome of which could ultimately decide what kind of democracy Taiwan ends up being. Although the *democratic compromise* we propose breaks with traditional notions of disobedience theory and governmental "responsibility", we believe such a compromise is the best way for Taiwan's democracy to move forward: by putting the ultimate judgment of the democratic contestation into the hands of the people.